SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 492

ALBERT L. ADELMAN and ELEANOR ADELMAN,
Petitioners,

v.

ST. LOUIS FIRE AND MARINE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was reported in .... Fed. Rep. 2d (....) ..... (Not reported as of this date).

The opinion of the District Court was not reported.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. Opinion rendered June 22, 1961.

2. Motion for rehearing, denied August 11, 1961.

3. Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U.S.C. Sec. 1254(1), and Rule 19(b) revised rules of the Supreme Court.

QUESTION PRESENTED

In a civil action in the Court of Appeals below, reviewing the application by the District Court of the law of Maryland to an insurance problem involving a fire loss which arose in Maryland on a policy written in Maryland, did the United States Court of Appeals for the District of Columbia Circuit err in applying the law of the District of Columbia instead of the law of Maryland?

STATUTE INVOLVED

Title 28, Section 1652, United States Code, Annotated.

STATEMENT OF THE CASE

The petitioners became the owners of a home in Silver Spring, Maryland during the year 1948. Their ownership continued and has continued up to the

present date. The insurance policy involved was written on June 15, 1958 to cover any fire loss of the house and contents and certain other coverages not necessary to discuss here.

A fire occurred on the premises on April 16, 1959, and the dwelling was damaged in the sum of $14,369.76, and the contents of the house suffered a loss in the sum of $14,922.37. At the time of the loss there were two policies on the dwelling and two on the contents.

No question was raised by the other insurance companies who readily paid their pro rata shares, but the respondent insurance company indicated to the petitioners that the company might set up a policy defense—that is to say, that it might take the position that because of the other insurance, the respondent company's policy was void. Said company further said that because the premiums for this policy had not been paid, it might not pay the loss.

An informal proof of loss was submitted by the petitioners It did not meet the requirements of a formal proof of loss, and contained no notarization The petitioners received no word from the insurance adjuster as to the determination by the company, but were advised that they could not be told anything because the adjuster had not received any instructions from his company. The petitioners, becoming exasperated by the failure of the insurance company to let them know, employed counsel, who learned that no formal proof of loss had been filed and who prepared and filed such a proof on August 26, 1959. This was after the sixty-day period provided for in the policy.

The insurance company, however, did not reject the claim on the grounds that it was untimely filed, and in fact retained the same without comment.

On October 13, 1959 the attorney for the respondent insurance company denied liability on the policy because the premium was not paid and because additional insurance had been obtained subsequent to the date of the policy in violation of the provisions of the policy.*

The suit was promptly filed and came on for trial before the Court without a jury. The District of Columbia law, as enunciated by the Court of Appeals, was that the failure on the part of the policy holders to file formal proof of loss within the time set by the policy was fatal to their case.

The Maryland law, on the other hand, as enunciated by the Court of Appeals of Maryland, is that where a claim is rejected no formal proof of claim need be made; and, if a proof of claim is untimely filed, the failure on the part of the insurance company to reject the claim on that ground waives the untimeliness of said proof of claim; and, further, even if the claim is rejected *after* the presentation period, such rejection still waives the policy requirement of filing sworn proofs of loss.

From an adverse decision based on the District Court's misconception of the Maryland law your petitioners appealed. The United States Court of Appeals for the District of Columbia Circuit, in a per curiam opinion, applied the law of the District of Columbia and held that the failure to file a formal

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* The letter also contained a third item: "such other defenses as may be available at the time."

Under the rule of ejusdem generis the third item necessarily applies only to defenses of the same nature as those listed, and did not contemplate the failure to file timely proof of claim.

proof of loss within sixty days prevented the recovery by the petitioners.

During the pendency of the appeal the District Court, at the request of the Court of Appeals, had indicated that absent the defense of untimely filing of the proof of loss, it would have found for the petitioners on part of their claim.

Your petitioners filed a petition for rehearing, asserting that the Court of Appeals had failed to apply the Maryland law, but on the contrary had applied the law of the District of Columbia. The petition for rehearing was denied without an oral hearing.

ARGUMENT

I.

The law of Maryland should have been applied

In the trial below it was stipulated that under the facts of this case the law of Maryland controlled. The real estate and personal property were located in Maryland, were covered by a policy issued under Maryland authority, and there was no basis for the application of any law except the law of Maryland to these facts.

Under Title 28, Section 1652, of the United States Code, Annotated, the law as adjudicated by the highest court in Maryland had to be applied.—*Erie Railroad Co.* v. *Harry J. Tompkins,* 304 U.S. 64, 93; 82 Law Ed. 1188.

II.

Under the law of Maryland the rejection of the claim, on grounds other than untimely filing of proof of claim, waived the requirement of the filing of any proof of claim

In *Federal Mutual Fire Insurance Co.* v. *Julien,* 144 Md. 380; 125 A. 229, the highest court of Maryland held that a denial of liability waived the requirement

of filing any proof of loss, even though the rejection occurred after the sixty-day period for presentation.

See also *Rokes* v. *Amazon Insurance Co.*, 51 Md. 512, and the cases cited therein.

III.

If the insurance company accepts an untimely proof of loss without objection, then such retention of the proof of loss without complaint waives any defect of untimely filing

In *Fireman's Insurance Company* v. *Floss*, 67 Md. 403; 10 A. 139, it was held that retention by an insurance company of a sworn proof of loss received without objection, would waive the defects, if any, of such proof of loss.

See also Cooley's Briefs on Insurance, Volume IV, sec. 3480; *Bakhaus* v. *Caledonian Insurance Co.*, 112 Md. 676, 77 A. 310; *Continental Insurance Co.* v. *Burns*, 144 Md. 429, 125 A. 232; and *Citizens Fire Insurance Co.* v. *Doll*, 35 Md. 89 [The *Doll* case was decided in favor of the insurance company, but was predicated on the fact that the rejection of the claim was expressly based on defective proof.]

REASONS FOR GRANTING WRIT

The Court of Appeals has applied the District of Columbia law to a case which should have been decided under Maryland law, contrary to the decisions in this Court. By doing so it has departed from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision.

The Court of Appeals should have looked only to the Maryland decisions to determine what rule to

apply. It does not matter what rule is supported by the weight of authority, and it is of no consequence that the District of Columbia Court of Appeals holds to the contrary.

It is respectfully submitted that this writ should be granted.

MARK P. FRIEDLANDER,
Attorney for Petitioners.

Of Counsel:

CHARLES WALKER.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,916

ALBERT L. ADELMAN and ELEANOR ADELMAN, APPELLANTS

v.

ST. LOUIS FIRE AND MARINE INSURANCE COMPANY, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 22, 1961

Mr. Mark P. Friedlander, with whom *Messrs. Charles Walker, Mark P. Friedlander, Jr.*, and *Blaine P. Friedlander* were on the brief, for appellants.

Mr. Cary M. Enver, with whom *Messrs. T. Howard Duckett* and *Richard W. Galiher* were on the brief, for appellee.

Before MR. JUSTICE BURTON, retired,* and WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: This is a fire insurance case, in which several defenses were raised against claims made by plaintiffs-appellants for losses due to partial destruction of a house and its contents. The District Court, after a trial without a jury, held that appellants were barred because they had failed to file written proof of loss within sixty days as required by the policy. Judgment was entered for defendant-appellee, and this appeal followed.

We are constrained to affirm. The requirement of filing formal proof of loss within sixty days is printed in bold face type in the policy, and the evidence is conclusive

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* Sitting by designation pursuant to Section 294(a), Title 28 U.S. Code.

that the policy itself had been in the possession of appellants. It is true that appellants submitted an informal proof of loss. But this does not of itself bring about a waiver of the requirement for substantial compliance with the proof of loss provision in the policy. *Glenco Corp.* v. *American Equitable Assurance Co.*, —— U.S. App. D.C. ——, —— F.2d —— (No. 16179, May 11, 1961). Here the adjuster knew of the occurrence of the fire, and reported it to the appellee. But the trial court concluded that the evidence did not show "any fraud, duress, or overreaching of any sort on the part of the adjuster. Further, the Court finds there was no expression of any willingness on the part of defendant to proceed with the question of liability without securing written proof of loss or any representation or statement to the insured which might lead them to assume that the requirement might be dispensed with, or to make them delay compliance, nor were there any other statements or acts by the adjuster which could reasonably be construed to constitute a waiver of the requirement to file written proof of loss within the 60 days." These conclusions appear amply supported by the evidence.

Under the circumstances, we do not reach the other contentions of the parties. The judgment of the District Court will be

Affirmed.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals was reported in .... F. 2d .... (D.C. Cir. 1961) (not reported as of this date).

The opinion of the District Court was not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered June 22, 1961. A petition for rehearing was denied August 11, 1961. The petition for a writ of certiorari was filed Oct. 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). and Rule 19(b) revised rules of the Supreme Court.

QUESTION PRESENTED

In a civil action, the Court of Appeals below, affirmed the decision of the District Court on an insurance problem involving a fire loss which arose in Maryland on a policy written in Maryland. Did the District Court of the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit base their decisions on Maryland law and correctly apply Maryland law?

STATEMENT OF THE CASE

Petitioners sustained a fire loss at their home in Silver Spring, Maryland, on April 16, 1959. (R. 6) At the time of loss petitioners' dwelling was insured by the American Equitable Insurance Company in the sum of $14,000.00 (R. 63). There was another policy on the furniture with American Insurance Company in the amount of $7,500.00 (R. 7). Petitioners also claimed under the policy issued by respondent. It was dated June 15, 1958 and dated to expire three years later (R. 28). Petitioners claimed the cancelled check in payment of the policy premium was destroyed in the fire. (R. 11) The bank on which petitioner says the check was drawn had no record of a check drawn by petitioner either

exactly or approximately in the amount of the premium at or near the time petitioner says the check was issued. (R. 13-14) The agent to whom the payment should have been paid also had no record of such payment.

Several hours after the fire an insurance adjuster was called by the insurance agent. Adjuster White representing respondent called on petitioners at the scene of the fire. At the time White had very little information as to policy coverage. He mentioned the petitioners seemed surprised that the policy in issue might be in effect. (R. 19-20) At the time he noticed that the other companies had already been on the scene and taken whatever action was necessary to preserve the property. Upon learning of a policy violation*, a non-waiver agreement was obtained by White. This was six days after the fire. The non-waiver agreement preserved the rights of the parties as to the possible incidents or the effects of investigation. (R. 43) Only one statement was ever taken from or offered by the Adelmans. That statement related only to the circumstances of acquiring fire insurance by the Adelmans and the coverage thereof. (R. 44) White had several calls from the Adelmans and advised them that he had had no instructions as to the company's attitude toward liability. (R. 22) At least as early as June 24, and apparently prior thereto, petitioners were represented by counsel. (R. 35) On August 27, 1958, more than two months after time provided by the contract,

* The policy contained the provision that "other insurance covering the dwelling insured hereunder (except existing insurance for which credit is given in this policy of insurance against perils not covered by this policy) is not permitted." There was such other insurance.

a purported proof of loss was filed. Thereafter on September 30, 1959, White received word that the matter had been referred to counsel. (R. 22) On October 13, 1959, petitioner's counsel was notified that the company denied liability. (R. 43)

Petitioners filed suit and the case was tried before the District Court of the District of Columbia without a jury. The District Court found that the petitioners failing to file written proof of loss within the required time prevented any recovery, citing Maryland cases for authority.

Petitioners appealed to the Court of Appeals of the District of Columbia Circuit and the Court of Appeals affirmed the District Court in a per curiam opinion that cited as authority a District of Columbia Court of Appeals case that was based on Maryland law. Petitioners unsuccessfully sought a rehearing on the ground District of Columbia law not Maryland law was applied.

ARGUMENT

I

The law of Maryland was applied

The Respondent admits that the law of Maryland is applicable to this case and submits that Maryland law was applied by the Court of Appeals.

In its per curiam opinion, the Court of Appeals cites *Glenco Corp.* v. *American Equitable Assurance Co.*, 289 F. 2d 899 (D.C. Cir. 1961). In that case, which involved a fire loss in the state of Maryland, the Court of Appeals, in deciding for the insurance company,

held that the plaintiff must comply with the proof of loss provisions of the policy, and found no evidence of waiver of such provision, citing for authority *Taubman* v. *Allied Fire Insurance Co. of Utica* et al 160 F. 2d 157 (4th Cir. 1947)

The *Taubman* case also involved a fire loss in the state of Maryland and Court of Appeals for the Fourth Circuit reviewed extensively the law of Maryland relative to compliance with the proof of loss provisions of fire insurance policies. Moreover, the District Court in the instant case cited *Grangers Mutual Fire Insurance Co. of Frederick, Md.* v. *Bleire*, 157 Md. 426, 146 A. 239, in support of its opinion.

II

The law of Maryland was correctly applied

The petitioners cite *Federal Mutual Fire Insurance Co.* v. *Julian*, 144 Md. 380; 125 A. 299, for authority that a denial of liability by the insurer waives the requirement for filing of a proof of loss even though the denial occurs after the sixty day period for filing. This statement correctly reflects the result of that case but the law of the case, stated on page 384 in quoting from *Rokes* v. *Amazon Insurance Co.*, 51 Md. 512, is that a waiver ". . . may be inferred from the acts and conduct of the insurer in-consistent with an intention to insist upon the strict performance of the conditions." In the instant case, there is the additional fact not mentioned in the petition, that less than one week after the occurrence of the loss, the petitioners executed a non-waiver agreement, wherein the parties agreed that any action taken by the insurance company shall

not "waive or invalidate any of the terms or conditions of any policy or policies and shall not waive or invalidate any right whatever of either of the parties to this agreement." (R. 43). In plain terms this agreement shows the intention of the parties to strictly preserve all rights and insist upon strict performance of all conditions of the policy.

The petitioners cite no Maryland authority wherein denial of liability by the insurance company or retention of an untimely proof of loss constituted a waiver of a non-waiver agreement. In *Fireman's Insurance Company* v. *Floss*, 67 Md. 403; 10 A. 139, cited by petitioners, there was no non-waiver agreement and the company continued investigation and negotiations after the alleged defective proofs of loss were filed. In *Bakhaus* v. *Caledonian Insurance Co.*, 112 Md. 676; 77 A. 310, *Continental Insurance Co.* v. *Burns*, 144 Md. 429; 125 A. 232 and *Citizens Fire Insurance Co.* v. *Doll*, 35 Md. 89 also cited by petitioners there were no non-waiver agreements executed. In the *Doll* case, however, the Court refused to imply a waiver where the insurance company expressly informed the insured that the proofs of loss submitted were not satisfactory and that it reserved all objections without waiving any of its rights under the policy.

Five years after the *Julien* case, *supra*, the highest court of Maryland decided the *Blieve* case, *supra*. The *Blieve* case would appear to be closest in point to the instant case and was cited by the District Court below in its opinion. There no proof of loss was filed by the insured and a non-waiver agreement was executed. In finding that there had been no waiver of the proof of

loss provisions of the policy the Court of Appeals of Maryland said at page 428:

> ". . . we do not find any recognition of liability on behalf of the company here, any expression of willingness to proceed with the settlement of questions of liability, without the sworn proofs of loss, or any representation or statement to the insured which might lead her to assume that the requirement might be dispensed with, or to make her delay compliance."

The question of whether there was a waiver of the proof of loss provision is one of fact for the trier of facts. *Continental Insurance Co.* v. *Burns, supra, Citizens Fire Insurance Co.* v. *Doll, supra.* In the instant case the District Court, without the aid of a jury, evaluated the evidence offered at trial and decided that there had been no waiver on the part of respondent.

REASONS FOR DENYING WRIT

The Court of Appeals for the District of Columbia Circuit has applied Maryland law and done so correctly consistent with the usual course of judicial proceedings. Moreover, the question presented is one of fact and accordingly is beyond the pale of need for exercise of this Court's power of supervision.

For the reasons stated the writ should be denied.

Respectfully submitted,

ANDREW D. SHALPE

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3038-59

ALBERT L. ADELMAN AND ELEANOR ADELMAN
Plaintiffs

vs

ST. LOUIS FIRE & MARINE INSURANCE
COMPANY, *Defendant*

Memorandum

Plaintiffs seek to recover under a fire insurance policy issued by the defendant on June 15, 1958 in the sum of $18,000 coverage on the dwelling, $7,200 on personal property and $1,800 for living expenses, as well as certain other coverage. In addition to said policy, plaintiffs held a policy of fire insurance with the American Equitable Assurance Company of New York in the sum of $14,000 insuring the same dwelling against fire, and a further policy on the furniture in the sum of $7,500 with American Insurance Company of Newark.

A fire occurred on the insured premises on April 16, 1959. It was stipulated during the trial that the damages to the dwelling was $7,184.88; to the personal property, $7,422.37; and that the plaintiffs sustained loss of living expenses in the sum of $1,800.

This case came on for trial before the Court without a jury on May 4, 1960. At the outset of the trial the defendant raised three defenses: (1) non-payment of premium, (2) failure to provide written proof of loss in accordance with the policy, (3) a violation of a provision of the policy prohibiting other insurance.

During the trial the first defense was abandoned by the defendant and the case was submitted upon defenses 2 and 3—failure to provide proof of loss and violation of a policy provision prohibiting further insurance.

Plaintiffs concede that written proof of loss was not submitted within the time required by the policy, but assert that such proof of loss was waived by the defendant.

As to the other defense, plaintiffs maintain that if there was a violation of the policy as to further insurance, it did not void the policy.

In view of the Court's conclusion that plaintiffs are barred from recovery because they failed to file written proof of loss and that there was no waiver of this requirement in the policy, it is unnecessary for the Court to determine the effect of the provision in the policy prohibiting other insurance.

Shortly after the fire, and within the 60-day period in which plaintiffs were required to file a written proof of loss, an adjuster for the defendant company interviewed plaintiffs, and when he discovered there were two other policies in force covering this property, he secured from plaintiffs a non-waiver agreement. This non-waiver agreement was signed within the 60-day period in which proof of loss was required.

It is conceded that plaintiffs failed to file such written proof within the 60-day period, but plaintiffs assert that defendant waived this requirement despite the non-waiver agreement. Both parties agree that Maryland law controls in resolving this issue. Plaintiffs assert they have been unable to find a case in Maryland precisely in point, but rely principally upon *Springfield Fire and Marine Ins. Co.* v. *Fine*, 216 Pac. 898, 90 Okla. 101. However, the facts in the *Springfield* case are clearly distinguishable from those in the case at bar. The adjuster in the *Springfield* case told the insured he was satisfied with the proof sub-

mitted and that the company would pay the policy within a short time.

In this case, the evidence does not show any offer or promise by the adjuster to pay the loss after the execution of the non-waiver agreement, nor does it show any fraud, duress, or overreaching of any sort on the part of the adjuster. Further, the Court finds there was no expression of any willingness on the part of defendant to proceed with the question of liability without securing written proof of loss or any representation or statement to the insured which might lead them to assume that the requirement might be dispensed with, or to make them delay compliance, nor were there any other statements or acts by the adjuster which could reasonably be construed to constitute a waiver of the requirement to file written proof of loss within the 60 days.

While it is recognized that under certain circumstances there may be a waiver even though a non-waiver agreement has been signed, such as in the *Springfield* case, this is not such a case. Absent any fraud or overreaching or any facts indicating an intention on the part of insuror to waive the agreement, non-waiver agreements have been sustained as valid (*Fidelity Phoenix Insurance Company of New York* v. *Vincent*, 7 S.W. 2d 203, 224 Ky 769, *Provident Fire Insurance Co.* v. *Ashy*, 162 S.W. 2d 684, 139 Tex. 334. See also *Grangers Mutual Fire Insurance Co. of Frederick, Md.* v. *Bleive*, 157 Md. 426, 146 Atlantic 239).

The Court holds, therefore, that plaintiffs are precluded from recovering in this case because of failure to file written proof of loss within 60 days, as required by the policy, which requirement was not waived by defendant.

This memorandum may be considered as findings of fact and conclusions of law.

LUTHER W. YOUNGDAHL
Judge

June 17, 1960